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Ong Chiu Yen v Wong Chee Leng & Anor

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HIGH COURT (MELAKA) — DIVORCE PETITION NO MA-33–132–09 OF 2019
MAIDZUARA MOHAMMED JC
19 APRIL 2021

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Family Law — Divorce — Petition — Petitioner wife filed divorce petition — Application by co-respondent for leave to file reply to divorce petition out of time — Whether application ought to be allowed

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The petitioner wife ('the wife') sought a divorce on the basis that the marriage between the wife and the respondent husband ('the husband') had broken down irretrievably. The grounds stated were: (a) the husband's adulterous relationship with the co-respondent; and (b) the husband physically harmed the wife. This was an application filed by the co-respondent for leave to file her reply to divorce petition out of time ('encl 36'). The co-respondent conceded that there was a lapse of ten months in filing encl 36. The onus was on the co-respondent to explain and the explanation must be on oath. In this respect, encl 35 ie the co-respondent's affidavit was filed in support of encl 36.

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Held, dismissing encl 36:

(1) There was no explanation offered by the co-respondent for the delay of ten months. There was therefore no material before the court to exercise its discretion in favour of the co-respondent (see paras 4–5).

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(2) In encl 35, there were no particulars offered by the co-respondent as to her alleged 'change of circumstances'. In her proposed reply to the divorce petition, the co-respondent did not specifically deny that: (a) the husband and the co-respondent committed adultery during the subsistence of the marriage between the husband and the wife; (b) her relationship with the husband during the subsistence of the marriage between the husband and the wife caused the marriage between the wife and the husband to break down irretrievably; and (c) the allegation by the wife of the physical harm inflicted by the husband onto the wife. On physical threat or harm by the husband vis a vis the co-respondent, the husband's medical condition and the husband's other sexual proclivities did not address the plea of physical harm by the husband against the wife. The co-respondent's proposed reply to the divorce petition was, at best, slim on the merits of her defence (see paras 10 & 19–24).

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[Bahasa Malaysia summary

Pemohon isteri ('isteri') memohon perceraian dengan alasan bahawa perkahwinan antara isteri dan responden suami ('suami') telah berpecah belah dengan tidak dapat lagi dipulihkan. Alasan yang dinyatakan adalah: (a) hubungan perzinaan suami dengan responden bersama; dan (b) suami mencederakan isteri secara fizikal. Ini adalah permohonan yang difailkan oleh responden bersama untuk kebenaran bagi memfailkan jawapan kepada petisyen perceraian yang terlebih masa ('lampiran 36'). Responden bersama mengakui bahawa terdapat kelewatan sepuluh bulan dalam pemfailan lampiran 36. Tanggungjawabnya adalah pada responden bersama untuk menjelaskan dan penjelasannya haruslah atas sumpah. Dalam hal ini, lampiran 35 iaitu afidavit responden bersama difailkan untuk menyokong lampiran 36.

Diputuskan, menolak lampiran 36:

(1) Tidak ada penjelasan yang ditawarkan oleh responden bersama untuk kelewatan sepuluh bulan. Oleh itu, tiada material di hadapan mahkamah untuk menggunakan budi bicara yang memihak kepada responden bersama (lihat perenggan 4–5).

(2) Dalam lampiran 35, tidak ada butiran yang ditawarkan oleh responden bersama mengenai dakwaan 'perubahan keadaan'. Dalam cadangan jawapannya kepada petisyen perceraian, responden bersama tidak secara khusus menafikan bahawa: (a) suami dan responden bersama telah berzina semasa berlakunya perkahwinan antara suami dan isteri; (b) hubungannya dengan suami semasa perkahwinan antara suami dan isteri menyebabkan perkahwinan antara isteri dan suami berpecah belah dengan tidak dapat lagi dipulihkan; dan (c) dakwaan oleh isteri mengenai kecederaan fizikal yang disebabkan oleh suami terhadap isteri. Mengenai ancaman fizikal atau kecederaan oleh suami berkenaan responden bersama, keadaan perubatan suami dan kecenderungan seksual suami yang lain tidak membicarakan pengakuan kecederaan fizikal oleh suami terhadap isteri. Cadangan jawapan kepada petisyen perceraian oleh responden bersama, paling tidak, nipis pada merit pembelaannya (lihat perenggan 10 & 19–24).]

Cases referred to

Ngu Chu Chiong @ Ngu Choo Chiong v Lina Soo [2008] 3 MLJ 42; [2008] 2 CLJ 783, CA (refd)

Spill v Spill [1972] 3 All ER 9, CA (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980

Benjamin Tay (Damian SL Yeo & LC Goh) for the petitioner.

Wong Nai Chee (Wong Nai Chee & Co) for the respondent.
Goh Han Koon (Goh & Lau) for the co-respondent.

Maidzuara Mohammed JC:

[1] Enclosure 36 is an application filed by the co-respondent for leave to file her reply to divorce petition out of time.

[2] The cause papers filed in respect of encl 36 are:

(a) encl 36: the co-respondent's notice of application dated 28 August 2020;

(b) encl 35: the co-respondent's affidavit affirmed on 27 August 2020;

(c) encl 37: the wife's affidavit affirmed on 9 September 2020; and

(d) encl 42: the wife's notice of intention to refer to the affidavit of service (encl 6) and the affidavit of service (encl 30).

DELAY OF TEN MONTHS

[3] There was a lapse of time in filing encl 36:

(a) the co-respondent conceded that there was a lapse of ten months. The computation of time is not disputed by the wife;

(b) the onus is on the co-respondent to explain; and

(c) the explanation must be on oath. In this respect, encl 35 was filed in support of encl 36.

[4] This court reviewed and considered encl 35. There was no explanation offered by the co-respondent for the delay of ten months.

[5] There is therefore no material before this court to exercise its discretion in favour of the co-respondent.

ADOPTING WRONG FORM

[6] The wife submitted that the co-respondent adopted the wrong form. The wife further submitted that the co-respondent should have filed a summons in chambers instead of a notice of application.

[7] The wife relied on *Ngu Chu Chiong @ Ngu Choo Chiong v Lina Soo* [2008] 3 MLJ 42 at p 48; [2008] 2 CLJ 783 at p 789 (CA).

[8] In *Ngu Chu Chiong*'s case, the Court of Appeal held that where the

Divorce and Matrimonial Proceedings Rules 1980 prescribe a specific mode for an application, such provisions must be complied with by an applicant. However, this court noted that the Court of Appeal stopped short of deciding that in situations where the wrong form is adopted by an applicant, the application must be dismissed *in limine*.

MERITS OF ENCL 36

[9] In encl 35 in particular para 7 therein, the co-respondent averred that she is a victim and due to a 'change of circumstances', she has to defend herself.

[10] In encl 35, there are no particulars offered by the co-respondent as to her alleged 'change of circumstances'.

[11] The wife sought a divorce on the basis that the marriage between the wife and the husband had broken down irretrievably (encl 1 para 8).

[12] The grounds stated in encl 1 were:

(a) the husband's adulterous relationship with the co-respondent (encl 1 paras 9 and 9.1); and

(b) the husband physically harmed the wife (encl 1 paras 10 and 10.1).

[13] This court reviewed and considered the proposed reply to divorce petition exhibited in encl 35.

[14] With regard to encl 1 para 8, the co-respondent pleaded that she has no knowledge that marriage between the wife and the husband had broken down irretrievably.

[15] With regard to encl 1 para 9 including 9.1, the co-respondent denies that she was the cause of the break up of the marriage between the wife and the husband.

[16] The co-respondent further pleaded that:

(a) she was not aware that husband was married when husband introduced himself to her;

(b) after the co-respondent became aware the husband was married, the co-respondent tried to leave the husband but the husband, who is aggressive and controlling, refused to allow her to do so until he injured her;

(c) the husband always acted aggressively and had physically harmed the co-respondent. On one occasion, the left third finger of the co-respondent was severed; and

(d) the co-respondent discovered that husband had sexual transmitted disease and he had complex sexual relationships with other women. According to the co-respondent, from messages between the wife and the husband on 'Facebook Messenger', there were attempts by the husband to find prostitutes. The co-respondent alleges that the husband is a philanderer and has many girlfriends.

[17] With regard to encl 1 para 10 including 10.1, the co-respondent pleaded that she has no knowledge that the husband had physically harmed the wife.

[18] As stated above, the first ground advanced by the wife was adultery between the husband and the co-respondent during the subsistence of the marriage between the husband and the wife.

[19] In her proposed reply to the divorce petition, the co-respondent did not specifically deny that the husband and the co-respondent committed adultery during the subsistence of the marriage between the husband and the wife.

[20] In her proposed reply to the divorce petition, the co-respondent did not specifically deny that her relationship with the husband during the subsistence of the marriage between the husband and the wife caused the marriage between the wife and the husband to break down irretrievably.

[21] Also as stated above, the second ground pleaded in the divorce petition was the physical harm inflicted by the husband onto the wife.

[22] The co-respondent did not specifically deny this allegation by the wife. Instead the co-respondent pleaded that she has no knowledge of this allegation by the wife.

[23] This court finds that on physical threat or harm by the husband vis a vis the co-respondent, the husband's medical condition and the husband's other sexual proclivities (see paras 2(a) to (d) of the proposed reply to divorce petition) do not address the plea of physical harm by the husband against the wife.

[24] This court finds that the co-respondent's proposed reply to the divorce petition is, at best, slim on the merits of her defence. See *Spill v Spill* [1972] 3 All ER 9.

A CONCLUSION

[25] On 1 February 2021, this court dismissed encl 36. This court also ordered that costs in the sum of RM5,000 shall be paid by the co-respondent to the wife.

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Enclosure 36 dismissed.

Reported by Nabilah Syahida Abdullah Salleh

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